IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 20 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KALIKAPRASAD RAMSAHAY - Appellant(s)
Versus
STATE OF GUJARAT – Respondent(s)

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Appearance :
MS BANNA S DUTTA appointed by Legal Aid Committee for Appellant
MR KT DAVE ADDL. PUBLIC PROSECUTOR for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 31/01/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. The appellant ('the accused' for short) was tried by the learned Special Judge, Surendranagar, in NDPS Case No.1 of 2001 for commission of the offences punishable under Section 8 (c) read with Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short), arraigned on the charge of having found with contraband article 'charas' weighing 1 Kg. 710 grams, without pass or permit, when he was intercepted and apprehended at the Lane near “Shankar Timber Mart” near the house of Hirabhai Bharvad at Joravarnagar, Taluka Surendranagar, District Surendranagar, on the basis of the prior information received by P.W.6, Karshanbhai Jivanbhai Jadav, PSI. At the end of the trial, the accused was found guilty of the offences with which he was charged and as his complicity is proved, the trial court convicted him vide judgment and order dated 23.11.2001 for commission of the offences punishable under Section 8 (c) read with Section 21 of the NDPS Act and sentenced him to suffer R.I. for ten

years and fine of Rs.1 lakh i.d., R.I. for further period of two years.

2. Aggrieved by the aforesaid judgment and order of conviction and sentence, the accused has filed this appeal under Section 374 of the Code of Criminal Procedure ('the Code' for short).

3. Briefly stated, the prosecution case as disclosed from the FIR and unfolded during trial, is as under:

3.1. P.W.6, K.J. Jadav, PSI, Surendranagar ADS Branch, received a secret information from an informant on 21.10.2000 to the effect that near the Lane of “Shankar Timber Mart” near the house of Hirabhai Bharvad, a man aged about 30-35 years, speaking Hindi Language belonging to UP and wearing Sky blue pant and shirt with a dark blue rexin bag containing charas was to come to sell it. He, therefore, recorded the said secret information in the register and also sent a copy thereof to his official superior. As his higher

officer ordered him to keep P.I. of LCB in the raid, he informed R.C. Rathod, P.I. of LCB with regard to the said information and also about the raid to be carried out. Since there was no register in the LCB Office for recording the said information, RC Rathod, PI prepared a report and registered the said report in the Joravarnagar Police Station. Thereafter Jayendrasinh, a head constable, was asked to procure the presence of two panchas as well as a gold smith with weighing machine for weighing muddamal which could be recovered in the raid. On arrival of the panchas as well as gold smith and the members of the raiding party, all of them were informed about the secret information received by P.W.6, KJ Jadav. Accordingly, he prepared the preliminary panchnama to the said effect.

3.2. After preparing the preliminary panchnama, he along with R.C. Rathod, PI, panchas, gold smith and the members of the raiding party, went to the place as per the description given in the secret information and

kept a vigil on the road. It is also the case of the prosecution that at about 4.30 P.M., a person corresponding to the description given in the secret information, came there who was intercepted and apprehended by him and R.C. Rathod and he was informed that as per the secret information received by them a person corresponding to the description of the accused was to come with contraband article charas and that was why he was apprehended. On inquiring his name, the accused informed that he is Kalikaprasad Ramsahay Kushvaha. P.W.10, RC Rathod informed the accused that he is a gazetted officer and he wants to search him and also informed him that if he is to be searched in presence of another gazetted officer or an executive magistrate, he would arrange for procuring their presence and the option was left to the accused but the accused did not opt for search to be carried out in presence of another gazetted officer or an executive magistrate and told that he may be searched by P.W.10, RC Rathod and, therefore, the accused was searched by

P.W.10, RC Rathod, PI in presence of the panchas, gold smith and members of the raiding party but nothing was found from the person of the accused. Thereafter the dark-blue rexin bag of the accused which was in the hands of the accused was opened and on opening the rexin bag, one plastic bag was recovered. Inside the plastic bag, another plastic bag was found and on opening that plastic bag, five bars of black coloured substance was found and on smelling the substance it was found to be charas. Thereafter the accused was asked to produce the pass/permit for carrying charas with him. The accused could not produce any pass or permit for carrying charas with him. Thereafter the charas was weighed in the weighing machine carried by P.W.5, R.J. Soni, the gold smith, and on weighing the charas, it was found to be 1 Kg. 710 grams. From these five bars P.W.10, R.C. Rathod and P.W.6, K.J. Jadav, took 100 grams for sample and thereafter two samples each of 50 grams were prepared and thereafter seizure, sealing and panchnama, etc., were completed and accordingly the second part of

the panchnama was also prepared.

3.3. A complaint for the aforesaid incident was filed at Joravarnagar police station by P.W.6, KJ Jadav where it was registered as CR No.II-67/2000, which is on record at Ex.21. On filing of the complaint, KJ Jadav handed over the muddamal and the accused to the PSO, Joravarnagar police station.

3.4. Thereafter further investigation was handed over to P.W.12 NJ Chudasma, PSI. As he proceeded on leave, the investigation was taken over by P.W.11, Shivrajkumar Merajbhai Dhandhal, PSI, Ex.31. He recorded the statements of the witnesses, recorded the statement of the accused, sent the muddamal to FSL for analysis. Thereafter, on returning of P.W.12, NJ Chudasma PSI, Ex.35, from leave, he, on receipt of the report from FSL certifying that the muddamal sent for analysis was charas and as sufficient incriminating evidence was found against the accused, filed charge-sheet against the accused

for commission of offences under Section 8 (c) read with section 21 of the NDPS Act before the learned Chief Judicial Magistrate, Surendranagar.

3.5. As the offences under the NDPS Act are exclusively triable by a Court of Sessions, the learned Chief Judicial Magistrate, Surendranagar committed the case to the Sessions Court, Surendranagar.

3.6. The learned Special Judge, Surendranagar before whom the trial was laid, framed charge against the accused for commission of the offences under Section 8 (c) read with Section 21 of the NDPS Act. As the accused pleaded not guilty to the charge and claimed to be tried, he was put to trial in NDPS Case No.1 of 2001 by the learned Special Judge.

3.7. To prove the culpability of the accused, the prosecution has examined and relied upon the oral testimonies of 12 witnesses, the details of which are given in para 4 of the impugned

judgment and order. They are as under:

P.W. No.	Name	Ex. No.	Page No.
1	Shaileshkumar Kantilal Patel, Panch witness	7	61-67
2	Ishwarbhai Mathurbhai Chauhan, Panch witness	10	91-102
3	Pradhyumansinh Agarsinh Rana, Police Head Constable	11	103-108
4	Dilipsinh Amirsinh, Police Head Constable	12	109-114
5	Vinodbhai Jayantibhai Soni	13	115-120
6	Karshanbhai Jivanbhai Jadav, PSI, complainant	15	123-134
7	Vanrajsinh Chanubha Zala, Police Head Constable	22	169-172
8	Shaktisinh Jagubha Jadeja, PSO	25	179-180
9	Jayendrasinh Agarsinh Rana, ASI	26	181-184
10	Raising Chandrasinh Rathod, PI	29	189-200
11	Shivrajkumar Merajbhai Dhandhel, PSI	31	205-206
12	Natvarsinh Jilubha Chudasma, PSI	35	221-224

3.8. To prove the case against the accused, the prosecution has also produced a number of documents, details of which are mentioned in para

5 of the impugned judgment and order. They are as under:

Sr. No.	Description	Ex. No.	Page No.
1	Panchnama with regard to seizing the muddamal from the accused	8	77-86
2	Order under Section 42 of the NDPS Act	9	87-90
3	Letter written to DSP Surendranagar by the PSI Jadav of Surendranagar ADS Branch	16	135-136
4	Confidential letter bearing outward No.404/2000 dated 21.10.2000 written by PI of Surendranagar LCB Branch to Joravarnagar Police station.	17	137-138
5	Cover of confidential letter bearing outward No.404/2000	18	139-140
6	Letter intimating the arrest of the accused	19	141-142
7	Copy of the receipt issued to the accused with regard to seizure of muddamal from him.	20	143-144
8	Complaint	21	145-166
9	Copy of the extract of Entry No.17/2000 from the station diary of Joravarnagar Police station.	23	173-174
10	Letter written to the PSI of Joravarnagar Police station by PI of Surendranagar LCB for filing offence against the accused and to take further investigation	24	175-178
11	Receipt issued by FSL, Ahmedabad	27	185-186

Sr. No.	Description	Ex. No.	Page No.
12	Copy of the letter written to the DSP under Section 58 of the NDPS Act with regard to the successful raid.	30	201-204
13	Report of FSL	32	207-210
14	Analysis report of FSL	33	211-212
15	Forwarding letter written to FSL for carrying out analysis	34	213-220

3.9. After recording of the evidence of the prosecution witnesses was over, the learned Special Judge explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement he denied the case of the prosecution in toto. He has also stated that he went to purchase wood from the lathi and at that time he found that one man was running away and at that time he asked the police in Hindi. Thereupon the police caught him as he also talked in Hindi and the police also extorted

Rs.250/- from him. However, he neither led any evidence nor did he examine any witness to support his defence.

3.10. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the trial court held that the prosecution has established, beyond reasonable doubt, that on 21.10.2000 the accused was found with contraband article 'charas' weighing 1 Kg. 710 grams, without pass or permit, when he was intercepted and apprehended at the Lane near “Shankar Timber Mart” near the house of Hirabhai Bharvad at Joravarnagar, Taluka Surendranagar, District Surendranagar, on the basis of the prior information received by P.W.6, Karshanbhai Jivanbhai Jadav, PSI and as he was found guilty of the offences with which he was charged, the trial court convicted him vide judgment and order dated 23.11.2001 for commission of the offences punishable under Section 8 (c) read with Section 21 of the NDPS Act and sentenced him to suffer R.I. for ten years and fine of Rs.1 lakh i.d.,

R.I. for further period of two years, which has given rise to instant appeal at the instance of the accused.

4. Ms. Banna Dutta, learned advocate for the accused, has contended that the prosecution has examined the members of the raiding party who have not followed the mandatory and statutory provisions contained under the NDPS Act and, therefore, on account of non-compliance of the provisions of NDPS Act, the prosecution evidence cannot be relied upon and cannot be acted upon. P.W. 1, Shaileshkumar Kantilal Patel, Ex.7 and P.W.2, Ishwarbhai Mathurbhai Chauhan, Ex.10 who are panch witnesses and P.W.5, Vinodbhai Jayantibhai Soni, a gold smith who had accompanied the raiding party for weighing the muddamal article 'charas', are independent witnesses, but they have not supported the case of the prosecution case, and, therefore, the prosecution has failed to establish the charge levelled against the accused. It is also contended by her that the prosecution has failed

to establish the fact that the muddamal contraband article reached the FSL intact and there was possibility of tampering with the muddamal on its journey from the time of seizure and filing of the complaint till it reached to the FSL. According to Ms. Banna Dutta, there is non-compliance of the provisions of section 52 and 55 of the NDPS Act. The trial court has erred in holding that the muddamal charas was properly and legally handled and it was not tampered with till it reached at FSL in sealed intact condition. On the aforesaid premises, it is submitted by her that the prosecution has failed to establish the charge levelled against the accused beyond reasonable doubt and, therefore, the impugned judgment and order of conviction and sentence deserves to be quashed and set aside by allowing this appeal and thereby acquitting the accused of the offences with which he was charged. She, therefore, urged to allow the appeal.

5. In counter submission, Mr. KT Dave,

learned APP, has submitted that by voluminous evidence produced by the prosecution, the complicity of the accused is proved beyond reasonable doubt. The accused was found and caught red-handed with contraband article charas when he was intercepted by P.W.10, RC Rathod, Ex.29 and P.W.6, KJ Jadav, Ex.15, at the Lane near “Shankar Timber Mart” near the house of Hirabhai Bharvad at Joravarnagar, Taluka Surendranagar, District Surendranagar, on the basis of the prior information received by P.W.6, Karshanbhai Jivanbhai Jadav, PSI. He has also submitted that after following and observing the mandatory and statutory provisions contained under the NDPS Act, the contraband article was seized and sealed in presence of the members of the raiding party as well as panchas. It is also submitted by him that the report of FSL in terms certified that the contraband article which was sent for analysis was charas. It is asserted by him that the prosecution has successfully established that the sample sent to FSL was not tampered with during the course of

its journey from the stage of seizure and filing of the complaint till reaching at FSL. It is also pointed out by him that panchas turning hostile is not unknown to criminal jurisprudence and that now-a-days it is on increase but that fact itself does not weaken the case of the prosecution as the case does not depend solely on the evidence of the panch witnesses. According to him, if the evidence of the members of the raiding party is of sterling quality then there is no reason to discard their evidence and on the basis of the evidence of the members of the raiding party, order of conviction can be passed. On the aforesaid premises, according to Mr. Dave, learned APP, the prosecution has established the case against the accused beyond reasonable doubt and, therefore, the trial court has rightly recorded the order of conviction and sentence. He further submitted that the impugned judgment and order does not call for any interference of this court in this appeal and as the appeal lacks merit, it deserves to be dismissed. He, therefore, urged to dismiss the appeal.

6. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a compete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read an re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of the caution sounded by the Supreme court while dealing with NDPS cases, this court has examined the entire evidence on record for itself independently of the trial Court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

7. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal

provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

8. In this connection, it would be appropriate to refer to the observations made by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as under:

> “The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring

about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith".

9. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Police

Inspector and the Police Sub Inspector during the course of search of the accused and seizure of the muddamal, contraband article, charas.

10. In this connection, we shall first refer to the testimony of P.W.6, K.J. Jadav, Ex.15, at pages 123-134 of the paper book. P.W.6, K.J. Jadav, PSI, Surendranagar ADS Branch, has, inter alia, testified that he received a secret information from an informant on 21.10.2000 to the effect that near the Land of “Shankar Timber Mart” near the house of Hirabhai Bharvad, a man aged about 30-35 years, speaking Hindi Language belonging to UP and wearing Sky blue pant and shirt with a dark blue rexin bag containing charas was to come to sell it. He, therefore, recorded the said secret information in the register and also sent a copy thereof to his official superior. As his higher officer ordered him to keep P.I. of LCB in the raid, he informed R.C. Rathod, P.I. of LCB with regard to the said information and also about the raid to be carried

out. Since there was no register in the LCB Office for recording the said information, RC Rathod, PI prepared a report and registered the said report in the Joravarnagar Police Station. Thereafter Jayendrasinh, a head constable, was asked to procure the presence of two panchas as well as a gold smith with weighing machine for weighing muddamal which could be recovered in the raid. On arrival of the panchas as well as gold smith and the members of the raiding party, all of them were informed about the secret information received by him and accordingly he prepared the preliminary panchnama to the said effect. After preparing the preliminary panchnama, he along with the panchas, gold smith and the members of the raiding party, went to the place as per the description given in the secret information and kept a vigil on the road. He has also testified that at about 4.30 P.M., a person corresponding to the description given in the secret information came there who was intercepted and apprehended by him and R.C. Rathod and he was informed that as per the secret information

received by him a person corresponding to the description of the accused was to come with contraband article charas and that was the reason why he was apprehended. On inquiring his name, the accused informed that he is Kalikaprasad Ramsahay Kushvaha. P.W.10, RC Rathod, also informed the accused that he is a gazetted officer and he wants to search him and also informed him that if he is to be searched in presence of another gazetted officer or an executive magistrate, he would arrange for procuring their presence and the option was left to the accused but the accused did not opt for search to be carried out in presence of another gazetted officer or an executive magistrate and told that he may be searched by P.W.10, RC Rathod and, therefore, the accused was searched by P.W.10, RC Rathod, PI in presence of this witness, the panchas, gold smith and members of the raiding party but nothing was found from the person of the accused. Thereafter the dark-blue rexin bag of the accused which was in the hands of the accused was opened and on opening the

rexin bag, one plastic bag was recovered. Inside the plastic bag, another plastic bag was found and on opening that plastic bag, five bars of black coloured substance was found and on smelling the substance it was found to be charas. Thereafter the accused was asked to produce the pass/permit for carrying charas with him. The accused could not produce any pass or permit for carrying charas. Thereafter the charas was weighed in the weighing machine carried by the gold smith and on weighing the charas, it was found to be 1 Kg. 710 grams. From these five bars he took 100 grams for sample and thereafter two samples each of 50 grams were prepared and thereafter seizure, sealing and panchnama, etc., were completed and accordingly the second part of the panchnama was also prepared. A complaint for the aforesaid incident was filed at Joravarnagar police station by him where it was registered as CR No.II-67/2000, which is on record at Ex.21. On filing of the complaint, he handed over the muddamal and accused to the PSO Joravarnagar police station.

10.1. In short, he has deposed as per the complaint lodged by him with Joravarnagar Police Station, which is on record at Ex.21, at pages 145-166 of the paper book. A perusal of the complaint at Ex.21, it is seen that oral testimony of the complainant gets corroboration from the complaint and there is no contradiction between the complaint and the oral testimony of P.W.6, KJ Jadav. It is also mentioned in the complaint about the strict compliance of the provisions of Sections 42, 43, 50, 52 and 57 of the NDPS Act. It may be noted that P.W.6, KJ Jadav, was cross-examined by the learned advocate of the accused and a lot of suggestions were made with regard to non-compliance of the statutory and mandatory provisions contained under the NDPS Act. However, he repelled all such suggestions and he stuck to the statement that all the statutory and mandatory provisions of the NDPS Act as required were followed. This witness has successfully withstood the test of cross-examination and nothing substantial has been

brought out during his cross-examination which would impeach his credibility.

11. The prosecution has thereafter examined and relied upon the evidence of P.W.10, Raising Chandrasinh Rathod, P.I., Ex.29, at pages 189-200 of the paper book. It may be appreciated that this witness has stated that P.W.6, KJ Jadav, PSI received the secret information with regard to the accused possessing contraband article 'charas' without pass or permit and this secret information was reduced into writing and it was conveyed to DSP and the DSP instructed P.W.6, KJ Jadav to inform him and take him also with him for raid and accordingly P.W.6, KJ Jadav conveyed the oral administrative instruction given to him by DSP to him and also required him to accompany him for the raid. The DSP also informed this witness, i.e., RC Rathod to accompany P.W.6, KJ Jadav, PSI, at the time of raid. He has also reiterated that they have followed the statutory and mandatory provisions contained under the NDPS

Act at the time of raid, seizure, sealing, etc. as provided under Sections 42, 43, 50, 52 and 57 of the NDPS Act. This witness was also cross-examined at length by the learned advocate for the accused but nothing substantial could be brought out from the cross-examination to impeach his credibility.

12. The prosecution has thereafter examined and relied upon the oral testimonies of P.W.3, P.A. Rana, Police Head Constable, Ex.11, at pages 103-108, P.W.4 of the paper book, Dilipsinh Amirsinh, Police Head Constable, Ex.12, at pages 109-114 of the paper book, P.W.7, V.C. Zala, Police Head Constable, Ex.22, at pages 169-172 of the paper book, P.W.8, S.J. Jadeja, PSO, Ex.25, at pages 179-180 of the paper book and P.W.9, J.A. Rana, ASI, Ex.26, at pages 181-184 of the paper book. They are the members of the raiding party and police personnel. They have in their oral testimonies deposed as to what role they played in the raid and about the strict compliance of

the mandatory and statutory provisions contained under the NDPS Act. They have also stated that the accused was caught with the contraband article 'charas' read-handed in their presence. All the above mentioned witnesses were cross-examined by the learned advocate for the accused but nothing substantial has been brought out from their cross-examination which would impeach their credibility.

13. The prosecution has thereafter examined P.W.11, S.M. Dhandhel, PSI, Ex.31, at page 205-206 of the paper book and P.W.12, Natvarsinh Jilubha Chudasma, PSI, Ex.35, at pages 221-224 of the paper book. They are investigating officers. They have recorded the statements of the witnesses and have also arranged to send the muddamal to FSL. It may be appreciated that both of them have investigated the case, but P.W. 12, N.J. Chudasma, Ex.35 has filed the charge-sheet.

14. So far as the statutory provisions

contained under Section 42 (1) of the NDPS Act is concerned, it deals with power of entry, search, seizure and arrest without warrant or authorization in a building, conveyance or enclosed place, between sunrise and sunset. So far as Section 42 (2) of the NDPS Act is concerned, it provides that where an officer takes down any information in writing under sub-section (1) of section 42 of the NDPS Act or records grounds for his belief under the provisos thereto, he shall forthwith send a copy thereof to his immediate official superior.

15. Admittedly, the secret information received by P.W.6, K.J. Jadav, was reduced into writing and he conveyed the said secret information to his immediate official superior.

16. Section 43 of the NDPS Act provides for Power of seizure and arrest in public places. The accused was intercepted and caught hold of near the lane, near “Shankar Timber Mart”, near the house of Hirabhai Bharvad, at Joravarnagar, which

is a public place and, therefore, in the instant case, admittedly Section 43 of the NDPS Act has to be invoked and not section 42 of the NDPS Act.

17. In the case of State of Punjab v. Balbirsingh, AIR 1994 SC 1872, the Supreme Court has observed that Section 43 which deals with the power of seizure and arrest in public places is slightly different from section 42 of the NDPS Act in certain respects. The empowered officer while acting under section 43, need not record any reasons of his belief. Section 43 also does not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to section 42. A similar view is expressed by this court in the case of State of Gujarat v. Abdul Rasid Ibrahim Mansuri, 1991 Drugs Cases 1 (Gujarat). In the said case the prosecution case was that the accused was found at public premises. At the same time, it was not the defence of the accused that he was at some place other than public premises. So legal position is clear that section 43 of the

NDPS Act would be applicable to the facts of that case.

18. In view of the aforesaid clear elucidation of the Supreme Court and this Court as well as testimonies, in instant case, provisions of Section 43 would be applied as the raid was carried out at a public place. Notwithstanding the aforementioned legal position, the secret information received by P.W.6, K.J. Jadav was reduced into writing and it was immediately communicated to his official superior as can be reflected from the documentary evidence on record. Therefore, the compliance of the mandatory provisions of section 42 of the NDPS act though not required, they have been fully complied with.

19. So far as the compliance of the mandatory provisions of Section 50 of the NDPS Act is concerned, the evidence is consistent. At the time of interception and raid, P.W.6, J.K. Jadav

and P.W.10, R.C. Rathod, had informed the accused that they are gazetted officers and if he so desired, he could be searched in presence of a gazetted officer or a magistrate or if he desired that he may be searched by them, then they will search him and the option was left to the accused and the accused preferred the second option and volunteered to be searched by P.W.10, R.C. Rathod. Therefore, P.W.10, R.C. Rathod, in presence of the panchas and other police personnel who were members of the raiding party, searched the person of the accused and during the search he found contraband article from the bag carried by the accused. Similar is the evidence of other witnesses who were the members of the raiding party. Therefore, provisions of Section 50 of the NDPS Act have been complied with. The said aspect has been reflected in complaint Ex.21, at pages 145-166 of the paper book as well as panchnama at Ex.8, at pages 77-86 of the paper book. Besides this, all the witnesses who were members of the raiding party have deposed accordingly. Therefore, it is clear that

mandatory provisions of Section 50 of the NDPS Act have been fully complied with.

20. So far as the journey of the muddamal from the stage of interception of the accused, search of the person of the accused, seizure and sealing of charas till it reached FSL has also been duly proved and all the witnesses, in this regard, is consistent. As per the said evidence, the muddamal was not tampered with at any stage and it reached the FSL intact in sealed condition. The procedure for sealing was done as per the practice adopted by the police in NDPS cases. FSL reports Ex.32, at pages 207-210 of the paper book and Ex.33, at pages 211-212 of the paper book, clearly show that the seal on the packet containing the muddamal was intact. Thus, it is clear that the muddamal was received by FSL intact in sealed condition and on analysis the muddamal it was found to be charas. Therefore, during journey of the muddamal from seizure and sealing till it reached FSL for analysis there was no question of tampering with

the said muddamal.

21. Independently this court has also perused the documents which are mentioned in paragraph 5 of the impugned judgment and from the perusal of the same it is clear that P.W.6, K.J. Jadav and P.W.10, R.C. Rathod have strictly followed the mandatory and statutory provisions contained under the NDPS Act and no discrepancy could be noticed by this court on the part of P.W.6, K.J. Jadav and P.W.10, R.C. Rathod, with regard to compliance of the provisions of NDPS Act.

22. The prosecution has thereafter examined P.W.1, S.K. Patel, Ex.7, at pages 61-67 of the paper book and P.W.2, I.M. Chauhan, Ex.10, at pages 91-102 of the paper book. It may be appreciated that these two witnesses are the panch witnesses but they have not supported the prosecution case and turned hostile. Therefore, they have been cross-examined by the learned A.P.P.

23. The prosecution has thereafter examined P.W.5, Vinodbhai Jayantibhai Soni, Ex.13, at pages 115-120 of the paper book. He is a gold smith and he was taken with the raiding party for weighing the muddamal article 'charas'. It may be appreciated that this witness has also turned hostile and the learned A.P.P. has cross-examined him.

24. By referring to the oral testimonies of P.W.1, S.K. Patel, Ex.7 and P.W.2, IM Chauhan, Ex.10, it is contended by Ms. Banna Dutta, learned advocate of the accused, that PW 1, S.K. Patel, Ex.7, at pages 61-67 of the paper book and P.W.2, IM Chauhan, Ex.10, at pages 91-102 of the paper book, who are panch witnesses and said to be independent witnesses, have not supported the prosecution case and, therefore, the prosecution has failed to prove the panchnama and hence the prosecution case cannot be believed. According to this Court, the aforesaid submission is absolutely feeble and has no substance and

merit.

25. It is well settled by catena of decisions of the Supreme Court that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. It may be realized that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasized hat the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision to the case were to depend solely on the testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right to veto to the panch as so far as the question of culpability of an accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer, if otherwise found to be true and dependable, cannot be

discarded by the court on the ground that they are police officers. On the facts and in the circumstances of the case, this Court finds that the testimonies of P.W.6, P.W. 10 and P.W. Nos. 3, 4, 6, 7, 8, 9, 10, 11 and 12 not only inspire confidence but get corroboration from the other evidence on record and from the evidence P.W.6, KJ Jadav and P.W.10. RC Rathod and other witnesses, the contents of the panchnama, which is on record at Ex.8, are proved.

25.1. Similarly, though P.W.5, V.J. Soni, Ex.13, has not supported the prosecution case and turned hostile, from the evidence of the other prosecution witnesses, such as, P.W.3, 4, 6, 7, 8, 9, and 10 and prosecution case against the accused is beyond reasonable doubt and turning of this witness hostile has not at all hampered the case of the prosecution case.

26. On overall view of the matter, according to this Court, the mandatory and statutory

provisions contained under sections 42 (1), 42 (2), 43, 50, 52 and 57 of the NDPS Act have been adhered to and complied with by P.W.6, K.J. Jadav and P.W.10, R.C. Rathod, and it is duly proved by the evidence of the prosecution witnesses. P.W.6, K.J. Jadav and P.W.10, R.C. Rathod, had taken utmost care and caution while seizing and sealing the said contraband article. The apprehension of tampering with the muddamal can be ruled out as from the stage of recovery of the muddamal till its reaching the FSL, proper care and caution was taken by the police personnel. It is on the contrary clearly proved that it was in the safe hands of police personnel and it reached at FSL intact in sealed condition for chemical analysis.

27. In view of the aforesaid evidence, there is no manner of doubt that when the accused was intercepted, apprehended and searched, he was found in possession of contraband article charas. Necessary formalities of search and seizure were complied with in presence of panchas and the

statutory requirements and formalities contained under the NDPS Act were followed and the samples were sent to FSL after following the procedures under the NDPS Act.

28. On close scrutiny of the evidence on record, we find no infirmities in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the trial court. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence passed by the trial court, as according to us, no other conclusion is possible except the one reached by the trial court in the facts and circumstances of the case.

29. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the trial court is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest public

time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of form.

30. In aforesaid view of the matter, there is no reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence. The sentence awarded to the accused is minimum and has to be maintained.

31. At this stage, it has been pointed out by Mr. K.T. Dave, learned APP, that the contraband article was charas and possessing the said contraband article, without pass or permit, is punishable under section 20 (b) (ii) of NDPS Act. However, through inadvertent mistake, the trial court has framed charge against the accused for commission of the offence punishable under Section 8 (c) read with Section 21 of the NDPS Act and also convicted the accused for the said offences. It is an error in framing the charge. However, the said error in framing charge cannot

be said to be failure of justice in view of the provisions of Section 464 of the Code. Therefore, according to him, the conviction recorded against the accused for commission of the offences punishable under Section 8 (c) read with Session 21 of the NDPS Act may be altered into the conviction for commission of the offence punishable under Section 20 (b) (ii) of the NDPS Act.

32. It is true that the trial court has, through inadvertent mistake, framed charge against the accused for commission of offence punishable under section 8 (c) read with section 21 of the NDPS Act, which is a mistake apparent on the face of the record as possessing the contraband article 'charas' without pass or permit, is punishable under section 20 (b) (ii) of the NDPS Act. Section 464 of the Code in terms stipulates that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was

framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. In instant case, according to this court, the error committed by the trial Court in framing the charge has not resulted into failure of justice and no prejudice has been caused to the accused. Therefore, this court, being a Court of appeal, can modify/alter the order of conviction by convicting the accused for commission of offence punishable under section 20 (b) (ii) of the NDPS Act instead of section 8 (c) read with Section 21 of the NDPS Act.

33. On the wake up of the aforesaid, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the trial court and as the appeal lacks merit, deserves to be dismissed. Of course, the conviction is

required to be altered by convicting the accused under Section 20 (b)(ii) of the NDPS Act instead of Section 8 (c) read with Section 21 of the NDPS Act. However, while dismissing the appeal, we deem it just and proper to modify the sentence imposed on the accused. According to us, in default of payment of fine of Rs.1 lakh, if the accused is ordered to undergo R.I. for six months instead of R.I. for 2 years, it would meet the ends of justice.

34. For the foregoing reasons, the appeal fails and accordingly it is dismissed. While maintaining and confirming the impugned judgment and order of conviction and sentence imposed on the accused, in default of payment of fine of Rs.1 lakh, we hereby order that the accused shall undergo R.I. for six months instead of R.I. for 2 years. The appeal stands dismissed accordingly with the above modification.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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